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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1932.

No. 304.

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners,

against

IRVING TRUST COMPANY as Trustee in Bankruptcy of EXPERIMENTER PUBLISHING CO., INC.,
Respondent.

BRIEF FOR RESPONDENT.

S. JOHN BLOCK,
Counsel for Respondent.

S. JOHN BLOCK,
ROBERT HALPERN,
of New York, on the Brief.

LODER PRINTING CO., INC., 63 Duane St., N. Y. C., WORTH 2-0689

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Supreme Court of the United States

OCTOBER TERM—1932.

THE PEOPLE OF THE STATE OF NEW YORK, Petitioners, AGAINST IRVING TRUST COMPANY as Trustee in Bankruptcy of EXPERIMENTER PUBLISHING CO., INC., Respondent.	No. 304.

BRIEF FOR RESPONDENT.

(**Note:**—The petitioner has informed the respondent by letter that it will not file any additional brief in the Supreme Court but will argue the case on the brief filed in connection with the application for certiorari. For this reason the respondent will include in this brief a statement of the case and will be unable to answer any specific assignment of errors as are intended, pursuant to Rule 27, subdivision 2(e) of the Rules of this Court, to be argued by the petitioner.)

I.

Opinions of the Courts Below.

The opinion of the referee has not been reported. It appears in the printed record (R. 61).

The opinion of the United States District Court, Southern District of New York (Hon. Frank J. Coleman, District Judge), has not been reported. It appears in the printed record (R. 65).

The opinion of the United States Circuit Court of Appeals, Second Circuit, is reported in 58 Fed. (2d) 980, and appears in the printed record (R. 69).

II.

Statement of the Case.

Experimenter Publishing Co., Inc., was adjudicated a bankrupt on March 6, 1929 (R. 13). Section 57-n of the Bankruptcy Act provides that claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication.

On March 29, 1929, the State of New York filed with the referee in bankruptcy a claim for unpaid franchise taxes amounting to $1,372.37, to which claim objection was made. At the same time the State of New York filed a notice of an unliquidated claim for franchise taxes for the tax years beginning November 1, 1928 (R. 10, 12).

Pursuant to the unanimous approval of the creditors of the bankrupt present or represented at a special meeting of creditors held April 3, 1929, after due notice, as provided by the Bankruptcy Act, the District Court through the referee made two orders confirming the sale by the trustee to certain purchasers of the assets of the bankrupt, upon the following terms: The purchasers to pay in cash on September 20, 1929, to the trustee the full amount of all claims filed with and allowed by the referee, as shown by a certificate of the referee to be delivered not later

than September 19, 1929, by the trustee to the purchasers, and the purchasers to furnish security for the payment in full of all claims filed but not yet allowed or whose status was otherwise still undetermined as shown by such certificate of the referee (R. 45, 46, 54, 55).

The date September 19, 1929, was 13 days after the expiration of the statutory six months' period for the filing of claims and 3 days after the expiration of the so-called tax bar order made July 1, 1929, and hereinafter described.

On July 1, 1929, an order was made by the District Court through the referee requiring the State of New York to file within 60 days after the service of said order proof of any or all claims of the State of New York against the bankrupt and providing that, upon failure to file such a claim within the time specified, the State of New York be forever barred from asserting any claim against the estate of the bankrupt or against the trustee or against the funds in the hands of the trustee (R. 8). Said order with notice of entry thereof was duly served on July 18, 1929 (R. 13).

On October 20, 1929, the State of New York filed a notice of an unliquidated claim for franchise taxes for the tax years beginning November 1, 1928, and for additional franchise taxes for the tax years beginning November 1, 1917 to 1928, inclusive. Said notice contains the statement "claim will be filed as soon as the necessary franchise reports can be obtained or such other information as may be necessary to fix and determine such tax or taxes." (R. 11, 13.)

On or about March 30, 1931, the trustee moved before the referee to expunge the two notices of unliquidated claims filed by the State. The referee granted the motion

to expunge as to the notice of an unliquidated claim for taxes dated October 17, 1929, and an order to that effect was made by the referee on September 2, 1931 (R. 3).

The People of the State of New York petitioned for a review of the order of the referee expunging the notice of the unliquidated claim filed October 20, 1929. Upon review by the District Court the order was in all respects affirmed (R. 2).

Upon appeal by the People of the State of New York from the District Court to the Circuit Court of Appeals, the order of the District Court was unanimously affirmed. In its opinion the Circuit Court of Appeals said:

> "Upon the authority of these cases the order appealed from is affirmed but without prejudice to an application by the People of the State of New York presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the trustee may contest the right to payment." (R. 70).

Upon the petition of the People of the State of New York, the Supreme Court allowed a certiorari to the Circuit Court of Appeals on October 17, 1932. (R. 71).

POINT I.

Inasmuch as sovereigns are not bound by ordinary statutes of limitation, courts of bankruptcy, in the exercise of their equity powers and for the purpose of effecting an orderly, just and expeditious administration of the estates of bankrupts, as required by various sections of the Bankruptcy Act, must of necessity issue orders fixing the time within which sovereigns must file their claims or be barred from participating in the distribution of estates of bankrupts.

Article I, Section 8, of the Federal Constitution conferred upon Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." Section 57-n of the Bankruptcy Act provides that claims shall not be proved against a bankrupt estate subsequent to six months after adjudication. It has been conclusively determined by this Court that that section is not binding upon the Federal or State Governments because they are sovereigns, and are not specifically mentioned in that section. (*United States* v. *Birmingham Trust and Savings Bank*, 258 Fed. 562; writ denied, 251 U. S. 550. *Lewis* v. *United States*, 92 U. S. 618).

It is well established that when no tax bar order has been served upon a sovereign, it may file a claim at any time while assets of a bankrupt or an insolvent estate in equity remain undistributed. The effect of these decisions is to permit a sovereign to file a claim at any time before final distribution.

The bankruptcy courts found that in practice this right of the sovereign made it possible to delay indefinitely the administration of bankrupt estates.

Section 64 of the Bankruptcy Act reads:

> "Section 64. Debts which have priority.—a. The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality * * *.
>
> "b. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (6) taxes payable under paragraph (a) hereof."

The foregoing provisions of Section 64 presented a conflict with the decisions determining that sovereigns may file claims at any time before final distribution, for Section 64 requires the Court to order the trustee to pay and the trustee to pay claims having priority before payment of dividends to creditors.

To obtain the benefits of the statute granting priority to tax claims the tax creditors must comply with the orders of the bankruptcy court made pursuant to the general powers conferred upon it by the Act, and among these orders are tax bar orders, the very purpose of which is to bring before the Court claims of sovereigns and of other taxing powers to be proved and determined so that tax claims may be paid by the trustee before the declaration and payment of dividends to creditors. The right to enjoy special privileges, such as priorities for tax claims, may carry with it special obligations in the form of obedience to orders requiring tax claims to be filed within a specified time, in default of which the filing of such claims shall be barred. Indeed, unless such orders shall be made and be binding upon sovereigns and other taxing powers, a bankrupt estate may remain open and unadministered for years, thus circumvent-

ing the purpose of the Bankruptcy Act, namely, to effect an orderly, just and speedy liquidation and distribution of the estate of the bankrupt.

Since the sovereign is not bound by the six months' statutory period for the filing of claims, a sovereign or other tax creditor may deprive general creditors of dividends indefinitely unless such sovereign or other tax creditor shall be required by a tax bar order to file its claim, if any, within a specified time or be barred.

In the present case the State contends that it had the right to file tardily a claim for taxes inasmuch as undistributed assets were at the time still in the hands of the trustee. The paper which the State filed, however, on October 20, 1929, as will be seen, was not a proof of an actual claim in the form prescribed by Section 57 of the Bankruptcy Act. It was a mere notice of an unliquidated claim for additional franchise taxes and of an intention to file a claim when the State should be in possession of such information as might be necessary to fix and determine the tax or taxes.

Section 2 of the Bankruptcy Act invests courts of bankruptcy with jurisdiction at law and in equity to:

> "(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; * * * (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; * * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; * * * (15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act; * * * Nothing in this sec-

> tion contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

The Courts have interpreted Section 2 of the Bankruptcy Act liberally and have held that the provisions of that section convey broad powers upon the bankruptcy court in connection with the administration of bankrupt estates. A few of the cases in which the provisions of Section 2 of the Bankruptcy Act were discussed will here be cited.

In *United States Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205, this Court said at page 217:

> "We think it is a necessary conclusion from these and other provisions of the Act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the Trustees and others who are employed to assist them * * *. A distinct purpose of the Bankruptcy Act is to subject the admintration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way as are the courts of bankruptcy."

In *Mitchell Store Building Co.* v. *Carroll*, 193 Fed. 616, appeal dismissed and writ denied in 232 U. S. 379, the Court said at page 620:

> "This provision (Section 2 of the Bankruptcy Act) must be given a free interpretation as con-

> veying 'broad powers' upon the bankruptcy court 'to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine otherwise in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy'."

In *In re Wood & Henderson,* 210 U. S. 246, this Court said at page 254:

> "Congress has the right to establish a uniform system of bankruptcy throughout the United States and, having given jurisdiction to a particular District Court to administer and distribute the property, it may in some proper way in such a case as this call upon all interested to appear and assert their rights."

Under the Bankruptcy Act, the referees are invested with, among other powers, the jurisdiction to perform such acts and duties as is conferred on courts of bankruptcy except as to questions arising out of the applications of bankrupts for compositions or discharges and except as may otherwise be provided in the Act. (Bankruptcy Act, Section 38).

In *William Filene's Sons Company* v. *Weed,* 245 U. S. 597, receivers in equity were appointed. The Court without statute took possession of all of the assets of the corporation to satisfy its debts. No statute prescribed the time for the proof of claims. This Court said at page 601:

> "When a statutory system is administered, the only question for the courts is what the statutes prescribe. But when the courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts except from the court's hands, they have no warrant for excluding creditors or for introducing sup-

> posed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. *In order to make a distribution possible, they must of necessity limit the time for the proof of claims.*" (Italics not the Court's.)

In bankruptcy we have a statutory provision prescribing the time within which general creditors must file their claims, but this provision is not binding upon sovereigns and for this reason the bankruptcy court in the proper exercise of its equity powers must, as in the *Filene* case just cited, of necessity limit the time for the proof of claims by the sovereign in order to make a distribution of the bankrupt's assets possible.

When we consider the command of the statute (Bankruptcy Act, Section 64) that debts having priority shall be paid in advance of the payment of dividends to creditors, *i.e.*, prior in time to the payment of dividends to creditors, we realize that the bankruptcy court must be clothed with the power to determine speedily the taxes which are to be paid before dividends to creditors may be declared. The argument of the State in this case reduced to its essence is that the filing by it of a notice that taxes may be due stays the declaration of all further dividends from the time of the filing of the notice and that the estate cannot be closed until the State's claim, *if any*, is filed and determined. The argument goes further and contends that bankruptcy courts are powerless to speed the determination of tax claims and the final distribution of the estate. The State maintains, further, that the administrative functions of the courts of bankruptcy must be paralyzed until the sovereign, at its leisurely pleasure, may decide that the time has come for it to file a claim which can be litigated. The argument of the State is almost, if not actually, self-refuting.

This Court has in a number of analogous cases determined that the courts of bankruptcy have powers implied from the Bankruptcy Act to ascertain the validity and amount of liens and to decree the method of their liquidation (*Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, at page 738); to inquire into the validity of liens, marshal them and control their enforcement and liquidation (*Straton* v. *New*, 283 U. S. 318, at page 321); to sell real estate of bankrupts free from liens of State taxes, transferring the liens from the property to the proceeds of sale (*Van Huffel* v. *Harkelrode*, 284 U. S. 225).

In *Van Huffel* v. *Harkelrode, supra,* this Court said at page 227:

> "The present Bankruptcy Act (July 1, 1898, 30 Stat. 544, c. 541), unlike the Act of 1867, contains no provision which in terms confers upon bankruptcy courts the power to sell property of the bankrupt free from encumbrances. We think it clear that the power was granted by implication. Like power had long been exercised by Federal courts sitting in equity when ordering sales by receivers or on foreclosure * * *. The lower Federal courts have consistently held that the bankruptcy court possesses the power, stating that it must be implied from the general equity powers of the court and the duty imposed by Section 2 of the Bankruptcy Act, to collect, reduce to money and distribute the estates of bankrupts, and to determine controversies with relation thereto.
>
> "No good reason is suggested why liens for State taxes should be deemed to have been excluded from the scope of this general power to sell free from encumbrances. Section 64 of the Bankruptcy Act grants to the court express authority to determine 'the amount or legality' of any tax * * *. Realization upon the lien created by the State law must yield to the requirements of bankruptcy administration."

The power to issue tax bar orders must be inferred from the general powers of the bankruptcy court to ascertain the amounts and priorities of claims of all creditors of a bankrupt and to effect a just and expeditious distribution of a bankrupt's estate among his creditors. As in the *Van Huffel* case, just cited, the State's tardy and uncertain claim for the payment of taxes of an unascertained amount "must yield to the requirements of bankruptcy administration."

In the present case, it does not appear that any diligent effort was made by the State to ascertain and compute the amount of its claim, if any, or to obtain an extension of time within which it might comply with the provisions of the tax bar order upon a showing of any alleged inability to comply with its provisions within the period of 60 days provided by the order.

POINT II.

The issuance and binding effect of tax bar orders have been consistently upheld by all Circuit Courts of Appeals to which the question of their validity has been presented.

In the case of *In re Anderson*, 279 Fed. 525 (C. C. A. 2nd), a trustee in bankruptcy moved for an order directing the United States to file a claim or be barred. The United States appeared specially and moved for a denial of the motion on the ground that the Court was without jurisdiction to make such an order. The trustee's motion was granted and on appeal the referee's bar order was affirmed, the Circuit Court of Appeals saying at page 529:

> "The United States must file its claim for taxes as any other creditor, if it desires to

> share in the estate, and the court must determine any question arising as to the amount or legality of such tax. It cannot stand by, as it did here, after permission having been granted to file its claim, and expect to subsequently collect the tax from the bankrupt or his trustee. To permit such a procedure would make it impossible to say when there could be a winding up of the bankruptcy proceedings and a distribution of the assets. The trustee may only pay out the assets under an order of the referee or the court, and without such order he could not pay the income tax owing to the government. If the government had a priority, it could be easily determined in this proceeding, and it clearly was the intention of Congress that it should be determined under the command of Section 64a, where the United States is specifically mentioned. We think it was the intention to have settled promptly in the bankruptcy proceedings all matters of taxes due the United States. The Bankruptcy Act evidently does not contemplate that taxes should be proved, like an ordinary debt, providing, as it does, that they shall be paid by the trustee on order of the court, and that he shall have credit in his accounts upon filing receipts from the proper officials therefor. *In re Prince & Walter (D. C.)* 131 Fed. 546."

Section 64-a of the Bankruptcy Act relates not only to claims for taxes due to the United States, but also to claims for taxes due to any state, county, district or municipality, and what was said in the *Anderson* case, just cited, applies with equal force to the present case involving, as it does, a possible claim for taxes alleged to be due to a State.

In *In re Stavin,* 12 Fed. (2d) 471, Judge Thacher, now Solicitor General, said with reference to tax bar orders at page 473:

> "But under Section 64-a, taxes legally due and owing by the bankrupt must first be deter-

> mined and ordered paid. For this purpose the bankruptcy court may by proper notice bring the state and the United States before it to the end that claims for all taxes legally due and owing may be ascertained and their validity determined. In the *Anderson* case, *supra*, this was done by an order similar to the orders here in question. Such orders are proper and clearly within the jurisdiction of the court in the exercise of its power under Section 64-a."

In *Matter of Morgenstern & Co., Bankrupt*, 57 Fed. (2d) 163 (C. C. A. 2nd), the Court affirmed an order of the District Court confirming an order of a referee expunging a claim filed by the Collector of Internal Revenue, and the Court said at page 164:

> "But, under our construction of Section 64-a of the Bankruptcy Act, the bankruptcy court, in aid of speedy administration, might limit the time within which the Government might prove its claim against the estate. If the Commissioner, because of existing exigencies, required more time to make his assessment, application should have been made to the court to modify its order so as to extend the time to file proof of claim. In default of such an extension the order barring claims would protect the trustee in distributions of assets made while it stood. Any other interpretation of its effect would enable the Government to take its time in presenting claims for taxes, and would thus destroy the very advantages which orders limiting the time to file tax claims have been designed to prevent."

In *In re Villere* v. *United States*, 18 Fed. (2d) 409 (C. C. A. 5th; writ denied 275 U. S. 532), the Court held that the United States was not barred by Section 57-n of the Bankruptcy Act and expressly distinguished the *Anderson* case. In the *Villere* case, however, no bar order had been made and the trustee

sought to expunge the government's claim when the government attempted to file a proof of claim after the one year period (now six months under the statute as amended). The Court said at page 410:

> "The trustee may, by proper notice served on the collector, require him to file his claim within a time fixed, or otherwise be barred, to the end that settlement of the estate may not be unreasonably delayed."

Apparently, this Court, in denying a motion for certiorari in the *Villere* case, approved the ruling of the Circuit Court of Appeals to the effect that the sovereign was not barred by Section 57-n of the Bankruptcy Act in having failed to file its claim within the statutory period for the filing of claims by general creditors and to the further effect that the trustee may, by proper notice or order, require the sovereign to file its claim within a time fixed or be barred.

In *In re J. Menist Co., Inc.*, 294 Fed. 532 (C. C. A. 2d; writ denied 265 U. S. 591), a trustee in bankruptcy sought to expunge two claims of the United States which had been filed after the expiration of the general statutory period (Bankruptcy Act, Section 57-n). The trustee's motion was denied. The Circuit Court of Appeals affirmed the order of the District Court and said at page 533:

> "We appreciate that Section 57-n is one of the provisions of the Bankruptcy Act which has for its purpose an expeditious winding up of a bankruptcy estate; but, under our decision *In re Anderson*, 279 Fed. 525, the trustee may avail of a simple and practicable method whereby the United States receives notice and thus is required promptly to prove its claim for taxes. The practical difficulties which would attend the requirement that the government

> should be held to the statutory limitation of Section 57-n are so great that we see no warrant for assuming that Congress intended, in that regard, any departure from the rule that the United States of America must be named before it can be bound by a statute of limitations."

A tax bar order names the sovereign sought to be bound by its provisions. Such an order is not general in its terms as is Section 57-n.

This Court denied a petition for certiorari in the *Menist* case and in so doing found no error in the ruling of the Circuit Court of Appeals to the effect that Section 57-n does not bind a sovereign and that the trustee may, however, resort to the issuance of a tax bar order to bind the sovereign and to require the sovereign promptly to prove its claim for taxes within the time specified in the order or be barred.

We see that this Court has in at least two instances, the *Villere* case and the *Menist* case, both above cited, denied applications for certiorari in cases in which the Circuit Court of Appeals of different Circuits gave its express approval to the issuance of tax bar orders. If it should be said that such approval was expressed in dicta of the Circuit Court of Appeals, those dicta, going to the very essence of the question before the Court, doubtless had the approval of this Court upon the denial of the applications for certiorari, for, had those important dicta incurred the criticism of this Court, this Court would doubtless have granted applications for certiorari for the purpose of annulling precedents established by repeated dicta of the Circuit Court of Appeals which would serve as guides to and be followed by the District Court in many similar cases.

In *United States* v. *Middle States Oil Corporation*, 18 Fed. (2d) 231 (C. C. A. 8th), a case involving an

equity receivership, the Federal Government failed to file a claim for alleged taxes according to the rules and notices prescribed by the Court. The United States government argued that the Court had no power to require the United States to file a claim within any particular time, that it was not bound by any statute of limitations and was not subject to the doctrine of laches because the public interest should not be prejudiced by the negligence of officers or agents of the government. The government contended that it had the right to file a claim for taxes at any time whatsoever regardless of any orders or rules of procedure of the District Court. The Circuit Court of Appeals said at page 238:

> "We do not so understand our general scheme of government. The situation is not one involving any statute of limitations or any question of laches, but it involves the question of whether the administrative branch of the government may ignore and refuse to accede to rules of the judicial branch made for the purpose of carrying on orderly judicial procedure and administering justice."

The question of the necessity for and the propriety of issuing tax bar orders in bankruptcy cases has been presented in a number of cases to the Circuit Court of Appeals of the Second, Fifth, Sixth and Eighth Circuits and in every instance the Circuit Court of Appeals gave its approval to the general principle of the legality of tax bar orders and their binding effect upon sovereigns. (*In re Anderson,* 279 Fed. 525 (C. C. A. 2nd); *In re J. Menist Co., Inc.,* 294 Fed. 532 (C. C. A. 2nd; writ denied 265 U. S. 591; *Matter of Morgenstern & Co.,* 57 Fed. (2d) 163 (C. C. A. 2d); *In re Villere* v. *United States,* 18 Fed. (2d) 409 (C. C. A. 5th), writ denied, 275 U. S. 532; *United States*

v. *Elliott,* 57 Fed. (2d) 843 (C. C. A 6th); *United States* v. *Middle States Oil Corporation,* 18 Fed. (2d) 231 (C. C. A. 8th).)

In *United States* v. *Elliott,* 57 Fed. (2d) 843 (C. C. A. 6th), a trustee in bankruptcy moved for an order directing the United States to file its claim, if any, for taxes on or before a day certain or be barred. The referee granted the motion and his order was affirmed by the District Court. The Circuit Court of Appeals reversed the District Court and said at page 844:

> "Neither the amount nor legality of the claim was questioned, and at the time it was stricken there remained in the court, undistributed, funds sufficient for its payment. We think the court erred in disallowing the filing of the claim. We do not think that the right of the Government to file its claim and have it considered on its merits by the court was unconditionally destroyed by the bar order. Such orders were sustained in *In re Anderson,* 279 Fed. 525, 527, C. C. A. 2, and in *In re Stavin,* 12 Fed. (2) 471, 473, D. C. They lie in the inherent power of the court. They are analogous to the usual orders in creditors' suits and insolvent proceedings in chancery whereby claimants are required to come in within a limited period or be excluded from participation in assets. *Daniels Chancery Practice, 4th American ed., Vol. II, p. 1204.*
>
> "But such orders in bankruptcy are within the control of the court until the termination of the case and may be revoked if no one suffers injury thereby. *In re Ives,* 113 Fed. 911, 913, C. C. A. 6; see also *People* v. *Hopkins,* 18 Fed. (2) 731, 733, C. C. A. 2. We think the circumstances here call for an application of this principle. The fund being in court, the taxes may yet be paid and the Trustee have credit therefor, as provided by Sec. 64-a, Bankr. Act * * *. It has been the practice of equity courts to abrogate the time limit for filing claims where

> a reasonable explanation is offered for failing to comply and to let in claimants upon such terms as might be imposed as long as the fund is in court."

The *Elliott* case, just cited, is distinguishable in several respects from the case at bar. In the *Elliott* case the government presented a claim for a specific amount and the claim was not questioned by the trustee. In the present case the claim which was expunged was a notice of an unliquidated claim, the notice containing a statement of an intention on the part of the State thereafter to file a claim "as soon as the necessary franchise reports can be obtained or such other information as may be necessary to fix and determine such tax or taxes" (R. 11). That notice did not comply with Section 57 of the Bankruptcy Act relating to the proof and allowance of claims for it did not set forth any actual claim consisting of a statement under oath in writing "setting forth the claim, the consideration therefor, and whether any, and if so what, securities are held therefor, and whether any, and if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor." In the present case, therefore, the legality of the notice of claim was questioned. In the present case it does not appear that there remain in the Court undistributed funds sufficient for the payment of the claim, if any, the amount of which has not been ascertained and is not before the Court.

The present case is further distinguishable from the *Elliott* case inasmuch as the State has offered no reasonable explanation for its failure to comply with the provisions of the bar order. In the *Elliott* case the Court said that a bar order "*may be revoked if no one suffers injury thereby,*" but in the present

case, if the bar order should be annulled, great and irreparable injury would be suffered by the diligent creditors who filed their claims within the statutory six months' period and who approved the contract for the sale of the assets of the bankrupt at the price of 100 cents on the dollar for every claim duly filed and allowed (R. 45, 46, 54, 55).) The State ignored the provisions of the bar order and weeks after the time provided for the making and delivery of the referee's certificate with respect to the claims filed and objected to the State filed not a proof of claim but a notice of an unliquidated claim for additional franchise taxes with notice of intention thereafter to file a claim. It is now well over three years since the State defaulted in complying with the provisions of the bar order. If at this time, after its gross laches, the State should be permitted to file a claim for additional franchise taxes, such claim, if allowed, would deprive the vigilant creditors, whose claims were filed in due time and allowed, of a portion of the dividends accruing to them pursuant to the contract made with the purchasers for the payment to the trustee of the full amount of those claims. A reversal of the order of the Circuit Court of Appeals herein would be tantamount to a nullification of the two orders of the District Court made April 10, 1929, following the unanimous action of the creditors at their special meeting, which orders approved the contract for the sale of the assets whereby the creditors were assured payment of 100 cents on each dollar of their claims. The record does not show that the two orders of April 10, 1929, have ever been attacked by the State or by any other party. Had the State filed its claim, if any, for additional franchise taxes within the period provided by the tax bar order and prior to September 19, 1929, the purchasers of the assets would, pursuant

to the contract approved by the orders of April 10, 1929, have been required to furnish cash or security sufficient to pay the State's claim in full. The contract with the purchasers and the orders of April 10, 1929, were matters of record with knowledge of which the State was charged. Indeed, the State had filed on March 29, 1929, a claim for franchise taxes amounting to $1,372.37 and an unliquidated claim for franchise taxes for the tax years beginning November 1, 1928 (R. 10, 12). Those claims were filed prior to the special meeting of creditors held April 3, 1929, at which the sale of the assets was approved, and prior to the making of the two orders of April 10, 1929. The State thus presumptively had notice of the proceedings in the bankruptcy court with regard to the sale of the assets of the bankrupt and the terms of sale. The State's failure thereafter to comply with the provisions of the tax bar order was inexcusable. It should be noted further that the record is devoid of any evidence of any attempt made by the State to open its default and to offer a reasonable explanation for its failure to comply with the bar order. It may be added that the affirmance of the order of the Circuit Court of Appeals by this Court would still permit the State, as provided by the decision of the Circuit Court of Appeals, to make an application "presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the trustee may contest the right to payment." (R. 70).

In *Employers Liability Assurance Corporation, Ltd.* v. *Astoria Mahogany Co.*, 6 Fed. (2d) 945 (C. C. A. 2d), a case involving an equity receivership, the District Court made an order requiring all creditors to file claims within 60 days or be barred. No sovereign was specifically named in the bar order. After 60 days a motion made by the United States for permission

to file a claim was denied by the District Court whose order was reversed by the Circuit Court of Appeals solely on the ground that the order to creditors was not specifically directed to the sovereign. The Circuit Court of Appeals said, citing *In re Anderson, supra,* that possibly the same course is open to a receiver under a creditors' bill as is open to trustees in bankruptcy and that there is an obvious difference between that and a decree for general limitation.

In *People of the State of New York* v. *Hopkins,* 18 Fed. (2d) 731 (C. C. A. 2d), an action in equity, the Court issued a general order limiting the time within which creditors should file claims but not specifically naming the State of New York, and the Circuit Court of Appeals, following *Employers Liability Assurance Corporation* v. *Astoria Mahogany Co., supra,* held that such an order would not preclude the State from subsequently presenting its claim for taxes. The Court said at page 733:

> "If, before distribution is actually made, a creditor appears and satisfies the court that he is justly entitled to share in the assets on hand, his delay in presenting the claim should not bar him *unless someone has been injuriously mislead thereby.*"

In the present case the Circuit Court of Appeals for the Second Circuit affirmed the order of the referee precluding the State from sharing in the assets "without prejudice to an application by the People of the State of New York presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the trustee may contest the right to payment." The State may still share in the undistributed assets if it can show that its failure to file its claim within the time limited by the bar order did not prejudice the creditors.

The *Hopkins* case is in accord with other decisions of the Circuit Court of Appeals respecting tax bar orders in holding that the failure of the sovereign to obey the mandate of the tax bar order will be excused if the sovereign can prove that its failure was not prejudicial. In this case the question of prejudice was not litigated on the motion to expunge the notice of claim and therefore the Circuit Court of Appeals quite properly affirmed the order expunging the claim but left open to the State an avenue of possible escape from the results of its own tardiness.

The referee in the present case, in expunging the claim of the State of New York, relied upon the case of *In re Mutual Parlor Suite Co.*, 11 A. B. R., N. S. 116 (Referee McDonald, Eastern District of New York, affirmed by Judge Inch), in which the Referee followed the *Anderson* case decision, *supra,* and expunged a claim filed after the expiration of the 60-day period and refused to file another claim offered after the expiration of the 60-day period.

In *Matter of Bates Machine & Tractor Co.*, 8 Fed. (2d) 424, a 30-day tax bar order was made and served upon the United States government. The collector filed certain actual claims for definite amounts. The trustee objected to one of the claims on the grounds that it was barred by the tax bar order and the referee dismissed that claim. Judge Wilkerson of the District Court in Illinois distinguished the *Bates* case from the case of *In re Anderson, supra,* by stating that in the *Anderson* case the tax had been levied more than two years prior to the filing of the petition by the trustee and that in the *Bates* case the additional tax was not levied until after the date fixed in the tax bar order had expired and the tax was levied and the claim was filed long before the time for the declaration of the final dividend under Section 65-b had ex-

pired. Judge Wilkerson reversed the order of the referee expunging the claim. He said that, in his opinion, Section 64-a does not confer upon the referee power, express or implied, to make the tax bar order, but in making this decision Judge Wilkerson's ruling is at variance with the uniform rulings of the Circuit Courts of Appeals of various circuits upholding the right of the bankruptcy court to make tax bar orders. The *Bates* case, further, is distinguishable from the case at bar in that in the latter no actual claim for a definite amount was filed.

POINT III.

The paper expunged does not conform with Section 57 of the Bankruptcy Act governing the proof and allowance of claims.

The "notice of unliquidated claim" filed by the State of New York does not comply with the requirements of the Bankruptcy Act. It should be noted that the notice reads:

> "Please take notice that the State of New York has an unliquidated claim for franchise taxes * * *. Claim will be filed as soon as the necessary franchise reports can be obtained or such other information as may be necessary to fix and determine such tax or taxes."

In all the bankruptcy cases discussed in this brief and in the brief filed by the State of New York in connection with its application for certiorari the Courts were confronted with actual claims. Here we are not confronted with an actual claim. We have a mere notice of an intention to file a claim at some unnamed

and indefinite future time. There is no provision in the Act for the filing of such a notice, nor does such a notice accord in any way with the practice in bankruptcy proceedings.

The filing of claims is governed by Section 57 of the Bankruptcy Act which reads as follows:

> "Section 57. Proof and Allowance of Claims.—a. Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

The act is explicit in providing for proofs of claims only. The filing of a notice of intention to file a claim is in no way a compliance with the Act and such notice is therefore a nullity. This uncertain, vague, and indefinite notice, if sanctioned, would place the trustee and the creditors in a dilemma. They could not attack the claim on the ground that it does not appear on the books of the bankrupt or on the ground that it is excessive. There is no claim here. If this notice had not been expunged and shall not remain expunged, the trustee and the creditors would be compelled to wait until the taxing authority should decide to file a claim, if such decision should ever be made. Such waiting could be for years and throughout infinity.

The vice of the notice filed by the State lies in the fact that it is not really a claim in itself but a mere notice of an intention to file a claim which may never be filed. Indeed, we see in this very case that the notice was filed tardily on October 20, 1929, that the motion to expunge it was not made until on or about March 30, 1931, and that during the entire interval of over one and one-half years the State

filed no actual claim, pursuant to its notice of an intention to file a claim. Nor does the State contend today that it has filed such an actual claim and it is now well over three years since the State filed the notice in question.

Must the trustee and the creditors wait indefinitely for the State to file a claim and shall the estate of the bankrupt remain indefinitely unclosed for this reason? The trustee and the creditors should not be compelled to delay the closing of a bankrupt estate because a creditor has failed to proceed in accordance with the Bankruptcy Act and the orders of the Court.

In the course of testimony taken before the referee upon the motion to expunge the notice filed by the State, the State's witness, Mr. Hutchins, testified on June 24, 1931, about one and one-half years after the State tardily filed the notice in question, that he is a corporation examiner of bankrupts, Department of Taxation and Finance (R. 22). Under cross-examination Mr. Hutchins testified:

> "Q. Have you made any attempt to bring on for hearing any of the claims you filed in this proceeding? A. No.
>
> * * * * * *
>
> Q. You stated that you learned in the early part of 1929 or prior to your going on vacation that the sale of the assets, including the books of the corporation, had taken place? A. Yes.
>
> * * * * * *
>
> Q. You say that your interpretation of the New York State tax statute is that no additional tax is due until the United States Government claim for taxes is finally determined? A. Until the matter is finally determined.
>
> Q. Then if the claim of the United States Government for approximately $31,000 should

be disallowed or reduced for any reason, you would not have a claim for taxes until that determination in this proceeding? A. That is correct.

Q. Therefore, you do not know how soon you will have any claim for taxes or whether you will have any at all? A. We know we have liabilities for taxes in some amount, a potential liability at least.

Q. Then as to the other ones for the year 1917 to 1928 additional taxes, if the Federal Government's claim is disallowed you have no claim for taxes? A. Correct.

Q. And until that is finally determined you cannot state positively whether you have or have not a claim for any amount? A. Unless the matter has been finally determined by a competent authority, if it has been settled by the Board of Tax Appeals and no review is taken, we will be in a position to file a claim. We do not know if the matter will be terminated in this proceeding or compromised or what will happen. We would like to know that." (R. 31, 32).

Mr. Hutchins and the State's Tax Department knew that the Federal Government had filed timely its claim for approximately $31,000 in August, 1929. This information was discovered by the State prior to September 16, 1929 (R. 30, 31). The State was, therefore, in a position to file, if it so desired, a claim similar to that of the Federal Government before the expiration of the period of the bar order which had been served upon the State. The Federal Government's claim was filed timely and the security furnished by the purchasers of the assets covered that claim. The notice expunged was not filed by the State until after the expiration of the six months' statutory period, the expiration of the period of the bar order and the expiration of the time for the delivery of the referee's

certificate as to the claims duly filed, and therefore no security was furnished by the purchasers of the assets to cover the amount of the State's claim, if any, for additional taxes.

Because of the failure of the State to file and prove its claim, if it should really have a claim, other creditors of the bankrupt should not be penalized by having the declaration of a possible final dividend herein, already delayed for several years, delayed any longer. As Judge Coleman of the District Court said (R. 66) in his opinion affirming the order of the referee:

> "To permit this sum to be tied up for an indefinite period in the future because of an unliquidated claim by the State which the latter is doing nothing to have determined would be a gross injustice to the creditors who unquestionably at this time could make good use of their money. Judging by the State's conduct in the past in this matter, if the claim is not expunged the fund will remain in the Court for years to come."

POINT IV.

To prevent prejudice and irreparable injury to diligent creditors of the bankrupt the order appealed from must be affirmed. That order does not finally preclude the State from filing a claim.

That portion of the argument under Point II of this brief which relates to the contract made between the Trustee and the purchasers of the assets of the bankrupt shows clearly that if the order of the Circuit Court of Appeals should be reversed any claim hereafter filed by the State for additional franchise taxes pursuant to the provisions of the notice which was

expunged would deprive the vigilant creditors, whose claims were filed in due time and allowed, of a portion of the dividends accruing to them pursuant to the contract made with the purchasers for the payment to the Trustee of the full amount of those claims, which contract was approved by the two orders of the court made April 10, 1929 (R. 45, 46, 54, 55).

The Circuit Court of Appeals in its decision affirmed the order of the District Court "without prejudice to an application by the People of the State of New York presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the Trustee may contest the right to payment" (R. 70).

The State is thus permitted to proceed as if the tax bar order had never been made. If the facts so warrant the State may apply for leave to file an actual claim by showing that the Trustee still holds undistributed assets and that no injury would be done to any other creditor by permitting the State to share in those undistributed assets.

Conclusion.

The expeditious administration of bankrupt estates and the Bankruptcy Act itself require that the courts of bankruptcy have the power to order sovereigns to file their claims within a specified time or be barred from participating in the distribution of bankrupt estates. This power is found in the broad equity powers of bankruptcy courts and is necessarily implied in the Bankruptcy Act. This power has been sustained by all the Circuit Courts of Appeals to which the question has been presented. In this case the sovereign has not as yet filed a claim capable of being litigated. The mere filing by it of a notice that it may have a

claim is insufficient to say the further distribution of the estate.

The affirmance by this Court of the decision of the Circuit Court of Appeals would not finally preclude the State from filing a claim. All possible rights of the State have been safe-guarded by the decision of the Circuit Court of Appeals which, in spite of the State's default under the tax bar order, nevertheless gives to the State the right to make "an application presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the Trustee may contest the right to payment." (R. 70).

The order of the Circuit Court of Appeals should be affirmed with costs.

Dated January 5, 1933.

Respectfully submitted,

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